U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[redacted]

APR 02 2007

FILE: WAC 05 196 51893 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner operates an investment income property that includes 45 residential units and a swimming pool. In order to employ the beneficiary in a position that the petitioner has titled "business analyst," the petitioner filed this petition to continue the beneficiary's H-1B status as a temporary nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The beneficiary was in H-1B status pursuant to the approval of a petition filed on her behalf by a previous employer.

The director determined the petitioner failed to establish the position as a specialty occupation. On appeal, counsel contends that the director misapprehended the nature of the proffered position in analyzing it as an administrative services management position. Counsel argues that the proffered position is a specialty occupation because its duties are "most similar" to the Management Analyst occupation as discussed in the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) and also resemble the Operations Research Analyst occupation as discussed in the *Handbook*.

For the reasons discussed below the AAO finds that the director's decision was correct. Accordingly, the appeal shall be dismissed, and the petition shall be denied.

The record of proceeding before the AAO contains: (1) Form I-129 (Petition for Nonimmigrant Worker) and supporting documentation; (2) the director's request for additional evidence (RFE); (3) counsel's response to the director's RFE; (4) the director's denial letter; and (5) on appeal: the Form I-290B and counsel's brief in support of the appeal, dated December 8, 2005.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> An occupation which [1] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [2] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) consistently interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

In accordance with the statutory and regulatory provisions to which 8 C.F.R. § 214.2(h)(4)(iii)(A) is related, Citizenship and Immigration Services (CIS) has consistently interpreted the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specialty occupation as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created that visa category.

In order to determine whether a petitioner has established that the position it has proffered actually requires the educational credentials prescribed by the statutory and regulatory framework on specialty occupations, CIS must look beyond the job title and the educational credentials that a petitioner specifies. CIS must examine what the record provides about the ultimate employment of the alien in the context of particular business matters generated by the position in the course of the petitioner's business. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). In this pursuit, the critical element is not the title of the proffered position or an employer's self-imposed standards, but whether the evidence of record establishes that actual performance of the position requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act. To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The AAO finds that the proffered position does not qualify under section *1* of 8 C.F.R. § 214.2(h)(4)(iii)(A). The evidence of record does not establish that the petitioner has proffered a position for which the normal minimum entry requirement is at least a bachelor's degree, or its equivalent, in a particular specialty.

The record of proceeding includes the following information about the petitioner and its business operations. The petitioner operates an investment income property consisting of 45 residential rental units with a market value of $8,000,000. At the time that the petition was filed, this property was undergoing renovation and expansion. At the time the petition was filed, planning was underway for an estimated $7,000,000 project for the construction of a 42-unit residential and commercial building. The construction would begin and be completed during the beneficiary's employment as business analyst, and the building would also be operated by the petitioner.

The organizational chart submitted by the petitioner indicates a relatively small organizational structure. According to the Form I-129, the petitioner employs five persons. The beneficiary would be subordinate to the petitioner's president and two vice presidents. Although counsel states on appeal that the beneficiary "does not hold any type of managerial or supervisory role in the company," the chart shows the beneficiary's Business Analyst box above and joined by descending lines to the Accountant, then the Property Manager, and, finally, the Electrician, Pool Service Man, and "Utility/Cleaning."

Documentary evidence submitted in support of the proffered position's specialty occupation status includes copies of: (1) a brochure on the 45-unit residential complex that the petitioner presently operates; (2) a group of Internet listings that provide information about the complex as a whole and some units for rent; (3) two Internet inquires about units for rent at the property; (4) an organizational chart; (5) documents submitted as the petitioner's business plan for the proposed additional property (apparently now a vacant lot): tables; minutes of a meeting; a plot plan, a drawing of the plot of land proposed for development and surrounding plots and streets; and drawings depicting the proposed North and East elevations of the additional property; (6) a deed and other documents related to the acquisition and proposed development of land for the additional property; and (7) a 2-page "Development Timeline" chart dealing with the proposed new construction.

The petitioner's June 20, 2005 letter of support, filed with the Form I-129, introduced the proffered position as follows:

> [The petitioner] is an investment income property containing 45 Residential Rental Units and has a swimming pool. . . . This building was built in 1965 and was purchased by [a named family] in 1997. This property has a present market value of Eight (8) Million Dollars. The said building is now under renovation and construction. [The owner] family is now in the planning of constructing another building in Hollywood (the revitalization area) consisting of 42 units, both commercial and residential, with an estimated project [sic] of 7 million [dollars]. In two years time, the property will have an estimated market value of 12 million dollars. This is now the reason why we want to hire a Business Analyst.
>
> As our Business Analyst, [the beneficiary's] duties will be: Study management methods in order to improve workflow, simplify reporting procedures and implement cost reductions. Analyze unit operating practices, such as record keeping systems, forms control, office

> layout, suggestion systems, personnel and budgetary requirements and performance standards to create new systems or revise established procedures. Analyze jobs to delimit position responsibilities for use in wage and salary adjustments, promotions, and evaluation of workflow. Study methods of improving work measurements and performance standards. Coordinate collection and preparation of operating reports, such as annual reports of organization, time and attendance records, terminations, new hires, budget expenditures and statistical records of performance data. Prepare reports, including conclusions and recommendations for solution of administrative problems and interpretations of operating policies.

As reflected in the above statement of duties, the petitioner limits the record's information about the position and its duties to generalized statements of generic functions, such as "study [of] management methods," "implement[ation of] cost reductions," "coordinat[ion of] collection and preparation" of reports; and "prep[ation of] reports . . . for solution of administrative problems and interpretations of operating policies." The record of proceeding neither describes nor provides documentary evidence to illustrate specific tasks that the beneficiary would be required to perform. The record also is devoid of concrete descriptions and documentary evidence that would convey the substantive content of issues that the petitioner's business operations would generate for the beneficiary to address. As such, the record provides an insufficient factual basis for counsel's contention that the record establishes the proffered position accords with the management analyst occupation and resembles the operations analyst occupation as those occupations are discussed in the *Handbook.* Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Qualification as a specialty occupation is not determined by a position's title or how closely a petitioner's description of the position approximates the *Handbook's* description of an occupation. Neither the Act nor the implementing regulations support such a formulistic approach: it would allow specialty occupation status without substantive evidence of specific work into which a position's duty descriptions would translate when actually executed in the context of the petitioner's business. To determine whether a particular job qualifies as a specialty occupation, CIS focuses on the record's evidence of specific work involved in actual performance of the job. *Cf. Defensor v. Meissner.* In order for a petitioner to rely on the *Handbook's* reporting of an occupation's degree requirement, the evidence of record must develop the performance aspects of the proffered position in terms sufficiently concrete to manifest the same degree requirement reported by the *Handbook* for that occupation. Such is not the case here. The *Handbook* indicates that management analyst positions in the private sector usually require the application of a master's degree level of specialty knowledge and that operations research analysts use highly specialized techniques such as "Monte Carlo simulation, linear and non-linear programming, queuing and other stochastic-process models, Markov decision processes, econometric methods, data envelopment analysis, neural networks, expert systems, decision analysis, and the analytical hierarchy process." The record of proceedings does not demonstrate that the proffered position would involve the application of the type and level of knowledge that the *Handbook* indicates as characteristic of the occupations to which counsel likens the proffered position.

The AAO finds that, to the extent that it is described in the record, the proffered position appears to be an internal property-management consultant position for which there is no matching occupation in the *Handbook*. The determinative fact in the AAO's application 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) to this case is that, as indicated in the above discussion, the record of proceeding does not establish substantive work that the beneficiary would perform at a specialty occupation level.

Because the evidence of record does not substantiate the proffered position as one that normally requires at least a bachelor's degree, or its equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

The petitioner has not satisfied either of the alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The first alternative prong requires the petitioner to establish that the specialized degree requirement is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava,* 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As discussed above, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for a bachelor's degree in a specific specialty. There are no submissions from professional associations, firms, or individuals in the petitioner's industry. The record contains no evidence that satisfies the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which provides a petitioner the opportunity to show that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty.

As evident in the comments above about the evidence about the proffered position, the record does not provide sufficient substantive information about the proffered position for the AAO to reasonably gauge its complexity or recognize any uniqueness that would necessitate hiring a person with at least a bachelor's degree in a specific specialty.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) for situations where the petitioner's requirement for a specialty degree accord with the educational requirements that the employer normally requires for that position. The record does not present the history of recruiting and hiring that is necessary to meet this criterion.

The evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(*4*) for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The AAO here incorporates its evidentiary

discussion with regard to the first criterion of 8 C.F.R. § 214.2(h)(iii)(A). Given the generalized description of duties to which the record is limited and the lack of concrete evidence of substantive work that the beneficiary would perform, the duties are not developed with sufficient specificity to establish the level of specialization and complexity involved in the performance of the proffered position. Consequently, the record fails to establish the degree association required by this criterion.

It is not relevant to the adjudication of this appeal that CIS had previously approved an H-1B petition filed on the beneficiary's behalf by a different employer. Each petition must be evaluated on the basis of its own particular factual record. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). The AAO office is never bound by a decision of a service center or district director. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court.

For reasons related in the preceding discussion, the petitioner has failed to establish the proffered position as a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.